IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 137

R. B. PARDEN, OTTO DRISKELL, MRS. ELIZABETH W. WIGGINS AND FRANK O. BURGE, JR., Suing in Their Capacity as Administrators of the Estate of JOHN ERVIN WIGGINS, Deceased, and AUBREY E. PRICE,
Petitioners,

vs.

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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CASES CITED

CONSTITUTIONS AND STATUTES

IN THE

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the adverse judgments entered in their separate but consolidated cases by the United States Court of Appeals for the Fifth Circuit, whereby it affirmed final judgments of dismissal of petitioners' suits in the United States District Court for the Southern Division of Alabama.

A.

REPORT OF OPINION DELIVERED IN COURT BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed is reported as *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 311 F.2d 727 (1963), and a copy of said opinion, together with a copy of the judgment and a copy of the order overruling petitioners' application for rehearing is appended hereto, pages A1 through A19, pursuant to Rule 23 (1) (i).

B.

JURISDICTION OF THIS COURT.

Jurisdiction of this Court is invoked on the following basis:

1. The judgment entry of the United States Court of Appeals for the Fifth Circuit adverse to petitioners was made on January 3, 1963.

2. The order of the United States Court of Appeals overruling the application of petitioners for a rehearing in said Court was entered on February 27, 1963.

3. Jurisdiction to review the judgment or decree in question by Writ of Certiorari is conferred on this Court by virtue of Title 28, U.S.C.A., Section 1254(1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

C.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review by this petition may be stated as follows:

1. Is an employee of an interstate common carrier railroad to be deprived of his remedy of suit for personal injuries under the Federal Employers Liability Act in a United States District Court because the railroad is owned and operated by the State of Alabama, of which the employee is a citizen, which state invokes a claim of immunity from such suits?

2. Whether the State of Alabama, admittedly engaged in the business of operating a common carrier railroad in interstate and foreign commerce, is amenable to suit in a United States District Court by its citizen-employees to recover damages under the Federal Employers Liability Act and/or the Federal Safety Appliance Acts for injuries sustained in line of duty.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Several statutes and constitutional provisions are involved, and as they are lengthy for the most part, citations alone will be inserted at this point and the texts of same are set forth in the appendix.

45 U.S.C.A., §51.

45 U.S.C.A., §56.

45 U.S.C.A., §1.

45 U.S.C.A., §2.

Alabama Constitution of 1901, Amendment No. 12 (Mobile Port Amendment).

Alabama Constitution of 1901, Amendment No. 116.

1940 Code of Alabama (Recompiled, 1958), Title 38, §17.

1940 Code of Alabama (Recompiled, 1958), Title 38, §45 (14, 16).

United States Constitution, Art. One, Section 8, cl. 3 (Commerce Power).

E.

STATEMENT OF THE CASE.

Petitioners, citizens of Alabama, were plaintiffs in separate suits filed in the United States District Court for the Southern District of Alabama, all of which were brought against the Terminal Railway of the Alabama State Docks Department, an agency of the State of Alabama, which admittedly is a common carrier railroad for hire doing business in interstate commerce between the several states and between the United States and foreign countries. All sought damages under the Federal Employers Liability Act on account of injuries sustained by employees of Terminal Railway while engaged in their employment with Terminal Railway and while engaged in such interstate commerce. (R. 5-13)

Jurisdiction of the United States District Court was based upon the Federal Employers Liability Act. 45 U.S.C.A., §51, *et seq.*, and particularly Section 6 thereof, 45 U.S.C.A., §56, which authorizes commencement of suits under the FELA in District Courts of the United States.

In each of such actions, the State of Alabama appeared specially and moved to dismiss the suits on the ground that the Terminal Railway is an agency of the State of Alabama, and the State of Alabama could not be sued on these causes of action in the United States District Court. (R.

15-17) In response to such motions to dismiss, the District Court dismissed all five suits (R. 72-73), and petitioners appealed to the United States Court of Appeals for the Fifth Circuit (R. 74), their cases being consolidated on appeal. (R. 76) The action of the District Court was affirmed by the Court of Appeals (R. 115-133), and petitioners' timely application for rehearing (R. 134-143) was overruled. (R. 144)

The Terminal Railway was and is fully owned and operated by the State of Alabama and consists of about 50 miles of railroad track in the area adjacent to the Alabama State Docks at Mobile, Alabama. (R. 68-70) It serves, in addition to the State Docks, several industries located in the area, and it operates an interchange railroad yard where cars are exchanged between the Alabama, Tennessee and Northern Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile & Ohio Railroad Company. (R. 49) The principal source of revenue of the Terminal Railway is for switching services rendered to other railroads, a charge being made for these services. (R. 52) About three to four hundred cars a day are handled by Terminal Railway in that portion of its operation. (R. 53) It also delivers freight to and from shipping which comes into or departs from the Alabama State Docks on vessels arriving from or departing to foreign countries. It owns its own equipment, including 50 miles of track, and employs 130 people. (R. 54-55) It has contracts and working agreements with the various railroad brotherhoods (R. 59-61), one of which provides regulations regarding the conduct of employees in divulging information concerning cases arising under the Federal Employers Liability Act. (R. 71) It reports to the Interstate Commerce Commission concerning injuries sustained by its employees (R. 61-62), and keeps its accounts so as to comply with Interstate Commerce Commission regulations. (R. 65)

These actions[1] were brought under the theory that Terminal Railway is a common carrier by railroad engaging in commerce between the several states, and the provisions of Title 45, U.S.C.A., Section 51, state that **"Every common carrier by railroad** while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce * * * for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery * * * or other equipment." (Emphasis supplied) Petitioners contend that the all inclusive word "every" as used in the statute, includes railroads operated by states of the United States. Concurrent jurisdiction of actions under the statute is conferred upon state and federal Courts by 45 U.S.C.A., §56.

H.

ARGUMENT.

A Writ of Certiorari should be allowed in this case for the reasons that (1) the Court of Appeals has decided an important question of federal law which has not been

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1. R. B. Parden filed two of the suits, one for personal injuries sustained July 13, 1958, and another for personal injuries sustained June 3, 1958; Otto Driskell sued for injuries sustained on July 22, 1958; Mrs. Elizabeth W. Wiggins and Frank O. Burge, Jr., as Administrators of the Estate of John Ervin Wiggins, deceased, sued for injuries sustained by Mr. Wiggins on November 15, 1958; and Aubrey E. Price sought damages for injuries he sustained on October 2, 1959. All of the suits were based upon 45 U.S.C.A., §51 *et seq.*, and two of them incorporated separate counts based upon violations of the Federal Safety Appliance Acts, 45 U.S.C.A., §1 *et seq.*

but should be settled by this Court, and (2) the decision conflicts with the principles of applicable decisions of this Court. Closely related questions have been decided by this Court previously in that it has been held that state owned and operated common carrier railroads are subject to the Safety Appliance Acts (*United States* v. *California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421), and the Railway Labor Act (*California* v. *Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037). It having already been determined that two of the three Federal Statutes regulating the employment relationships of all common carrier railroads, it is important to determine whether state operated railroads are also subject to the third such statute, also applying to all interstate common carrier railroads, the Federal Employers Liability Act.

The importance of this federal question is apparent when it is realized that the effect of the decision of the Court of Appeals is to deprive petitioners and others similarly situated of their remedy for enforcement of a clear federally granted right.

This case presents the unique situation of a railroad which is subject to the Federal Safety Appliance Acts (which refer to **"any common carrier engaged in interstate commerce by railroad"**) and the Railway Labor Act (which refers to **"any carrier by railroad,** subject to the Interstate Commerce Act"), yet it is effectively escaping the consequences of the Federal Employers Liability Act which provides that **"every common carrier by railroad"** is subject to suit under the act in the District Courts of the United States.

Congress, in the valid exercise of its powers under the Commerce Clause of the United States Constitution, has so regulated railroads, including state operated railroads,

as to require their submission to the strict safety regulations designed to protect employees from injury because of defective railway appliances. Congress has also required state operated railroads to conduct its employee relationships in accordance with the Railway Labor Act. The broad language of the Federal Employers Liability Act equally demands the conclusion that state operated railroads are liable to its injured employees under the act, and the remedy of suit in the U. S. District Courts is a necessary and integral part of the Federal Employers Liability Act.

In our Statement of the Case, we have pointed out sufficient portions of the record to show that the Terminal Railway is engaged in extensive profitable operations as a common carrier by railroad for hire in interstate commerce, and as was recognized in the opinion of the Court of Appeals, there is no dispute on this point. The operation of this railroad is authorized by amendments to the Constitution of the State of Alabama as well as by enabling statutes. Thus, the State of Alabama has constitutionally placed this agency in the category of railroads included in the broad definition of carriers subject to the Federal Employers Liability Act. By engaging in such a business, the railroad is necessarily subject to certain obligations, duties and liabilities imposed by the Federal Statutes. Congress having spelled out its regulations of railroads so as to include any and every railroad when a state chooses to go into the railroad business, it must accept the obligations and liabilities imposed upon railroads by Congress. One of these is that such railroad is amenable to suit in a United States District Court under the FELA, and when Alabama placed itself under the Act, it necessarily subordinated any immunities which it otherwise might have had to the valid regulations of Congress with respect to such railroad business.

When this Court held that the State Belt Railroad of California was subject to the Federal Safety Appliance Act (the action originated as a suit to recover the statutory penalty for a violation), it held that the exercise by a state of the power to operate a railroad must be in subordination to the power of Congress to regulate interstate commerce. Further:

> "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the constitution.
>
> * * *
>
> "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. **The Federal Safety Appliance Act is remedial, to protect employees** and the public from injury because of defective railway appliances. * * *. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. **No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.**
>
> * * *
>
> "Since the section which, as we have held, imposes the liability upon state and privately-owned carriers alike, also provides the remedy and designates the manner and the court in which the remedy is to be pursued, we think the jurisdictional provisions are as applicable to suits brought to enforce the liability

of states as to those against privately-owned carriers, and that the district court had jurisdiction."
United States v. *California*, 297 U.S. 175, 80 L. Ed. 567, 56 S. Ct. 421.

Later, when California's railroad was again before this Court seeking to avoid the consequences of the Railway Labor Act, it contended that congressional intent to include state railroads within the act was doubtful because other federal statutes governing employer-employee relationships expressly exempted employees of the United States or of a state. In holding that the Railway Labor Act applied to state railroads, this Court said:

> "We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees.
>
> • • •
>
> "If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."
> *California* v. *Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037.

The FELA is the third Act of the Congress which regulates railroads in regard to their duties as to employees. Although this Court has already held that state railroads are governed by two of such regulations, it has yet to pass on the applicability of the FELA. (However, it has held that the parallel Jones Act does apply to state agencies which employ seamen, *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785; and California holds that its railroad is subject to

FELA suits in its state courts. *Maurice* v. *State*, 34 Cal. App. 2d 270, 110 P.2d 706.)

CONCLUSION.

The position of petitioners may be summarized in outline form as follows:

1. In delegating to the federal government the exclusive power to regulate interstate commerce, the states vested in Congress the right to regulate all interstate railroads, whether state or privately operated.

2. In so doing, the states necessarily surrendered any sovereign immunity which may conflict with valid regulations of Congress which are applicable to state operated railroads.

3. Congress having made the FELA applicable to "every common carrier by railroad", which necessarily includes state operated railroads, states thereafter choosing to engage in an interstate railroad business must be considered as having entered into such enterprise in full subordination to the all-embracing terms of the FELA, a portion of which subjects such railroads to suits in District Courts of the United States.

Petitioners suggest that since this Court has already held that the Safety Appliance Acts, the Railway Labor Act and the Jones Act all apply to state agencies which come within the all-embracing terms of those acts, and a United States Court of Appeals has held that the equally all-embracing terms of the FELA do not apply to states, a federal question has been decided in a way which conflicts with applicable decisions of this Court, and therefore certiorari should be granted. It further appears that this is an important question of federal law which has not

been directly decided by this Court, but should be now settled. As was observed by Circuit Judge Brown in his concurring opinion in the Court below, petitioners have a clear legal right. But the decision of the Court of Appeals has denied them the means of effectual enforcement. The decision conflicts with the principles upon which the decisions of this Court were based in the California cases. This conflict can only be rectified by the granting of a Writ of Certiorari so that the question may be fully reviewed by this Court.

Respectfully submitted,

AL. G. RIVES,
Attorney for Petitioners.

TIMOTHY M. CONWAY, JR., and
RIVES, PETERSON, PETTUS & CONWAY,
Of Counsel for Petitioners.

CERTIFICATE AS TO SERVICE.

I hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari, properly addressed, to each of the following: Honorable Richmond Flowers, Attorney General for the State of Alabama, Montgomery, Alabama; and Honorable Willis C. Darby, Jr., Attorney at Law, First National Bank Building, Mobile, Alabama, counsel of record for defendants in the Court below, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the _____ day of May, 1963.

AL. G. RIVES,
Attorney for Petitioners.

APPENDIX

APPENDIX A.

Opinion of Court Below.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19519

R. B. PARDEN, ET AL.,
Appellants,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(January 3, 1963)

Before RIVES, CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: This appeal involves the question whether the State of Alabama may be sued by its citizen in a District Court of the United States on a claim

based upon the Federal Employers Liability Act[1] for damages for personal injuries sustained by its citizen while employed by a railroad belonging to the State of Alabama which was operated as a common carrier in interstate commerce and while he was so engaged. The action[2] was brought against Terminal Railway Alabama State Docks; and the sovereign State of Alabama, entering its appearance specially, moved to quash the return of summons on it or to dismiss the action, on the grounds that the Terminal Railway was an agency of the State, that the State had not

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1. Title 45, U.S.C.A., § 51:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or any insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment."

Concurrent jurisdiction of actions under the statute is conferred by 45 U.S.C.A., § 56, in state and federal courts.

2. Besides the action brought by R. B. Parden for personal injuries sustained July 13, 1958, four other actions were brought which involve the same jurisdictional facts as Parden's claim, varying only in the details of the facts as to liability and the injuries received. These four are: a second action filed by Parden for personal injuries sustained June 3, 1958; action by Otto Driskell alleging two injuries received by him on July 22, 1958; action by Mrs. Elizabeth W. Wiggins and Frank E. Burge, Jr., Administrators of the estate of John Irvine Wiggins, deceased, based on claims for two injuries received by him November 15, 1958, contributing to his death; and action by Aubrey E. Price claiming two separate personal injuries occurring Oct. 2, 1959, one based upon the Federal Employers Liability Act and the second upon the Federal Safety Appliance Act, 45 U.S.C.A., § 2. The several actions were consolidated for trial in the court below and for purposes of this appeal.

The first action of R. B. Parden will be discussed in most instances, but everything herein said will have reference also to the other four civil actions.

consented to be sued or waived its immunity, and that the judicial power of the United States did not extend to this controversy because it is between a citizen of Alabama and the State of Alabama. Both motions were heard on the face of the pleadings supplemented by four affidavits and two depositions and were granted by the court below in an order stating:

> "It is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return of service of summons be, and the same hereby is, Granted, and
>
> "It is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the Plaintiff."

The parties do not contend on appeal that there is any dispute about the facts, but agree that the case presents only questions of law. The basic facts are here set forth and others will be adverted to in our discussion of the several arguments:

The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce Commission concerning injuries sustained by its

employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission.

Appellant Parden argues that the owner of every common carrier by railroad engaging in interstate commerce is liable for injuries to its employees so engaged under the clear and all-embracing language of the F.E.L.A. quoted in footnote 1, *supra*;[3] that the State of Alabama is so liable because it operates this railroad under constitutional amendment[4] and statute;[5] and that, under the Commerce Clause of The United States Constitution and three Supreme Court cases hereinafter considered, it is subject to and liable under F.E.L.A. and the Safety Appliance Act to the same extent as an individual.

Alabama counters with the contention that the whole sum of the judicial power granted by the Constitution to the central government does not embrace any authority in its courts to entertain a suit brought by a citizen against his own State; and that the State of Alabama has not waived its immunity from suit. The appellant responds by asserting that the general principles relied upon by the State do not apply where the State is deemed to have consented to suit; and that, since Alabama is not protected by the Eleventh Amendment to the Constitution, it is deemed to have consented by the mere fact that it entered into and conducted the operation of an interstate railroad under the statutory and organic law of the State.[6]

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3. And under the Federal Safety Appliance Act, Title 45, U.S.C.A., § 2, as to one of the civil actions now before us.

4. Alabama Constitution, 1901, Amendments 12 and 116.

5. 1940 Code of Alabama (Recompiled, 1958), Title 38, §§ 17 and 45 (14, 16).

6. Appellant's position is well epitomized in the following excerpts from its reply brief:

"None of the authorities cited under this subdivision of the opposing argument hold that the judicial power of the

We do not agree that the State of Alabama, by the mere fact that it legally operated an interstate carrier, surrendered its right not to be sued, which belongs to the Union and all the States in it, except as explicitly provided otherwise in the Constitution. It is conceded that Alabama could not be sued by a citizen of another State seeking to assert the identical right claimed here. This, the appellant conceives to be a protection vouchsafed by the Eleventh Amendment which, it says, Alabama does not possess when it is sued by its own citizen. We think this attitude arises from a misunderstanding of the effect of the Eleventh Amendment and of the status of the States of the Union independent of it. This is made clear by a brief consideration of the history of the Amendment as developed in decisions of the Supreme Court.

Almost before the ink had dried on the signatures to the Constitution, a citizen of South Carolina filed suit against the State of Georgia in the Supreme Court of the United States asserting jurisdiction under Article III, Section 2, Clause 1 of the Constitution.[7] The Supreme Court[8]

United States does not embrace the authority to entertain a suit brought by a citizen against his own state, where the State has consented to such suit. . . .

"We urge that it is a sound construction of the Federal Employers Liability Act, when considered in the light of Supreme Court decisions concerning the Safety Appliance Acts and the Railway Labor Act, that Congress has prohibited any entity, state or private, from engaging in business as an interstate common carrier railroad, without consenting to be sued in a United States District Court under the Federal Employers Liability Act. . . .

"As we see it, if the Constitution of the State of Alabama authorizes the operation of this railroad, then it is subject to all the provisions of the Federal Employers' Liability Act. Liability under the Act can be avoided only if the State is acting unconstitutionally by operating the Terminal Railway of Alabama State Docks."

7. "The judicial Power shall extend . . . to controversies . . . *between a State and Citizens of another State; . . .* and *between a State . . . and foreign States, Citizens or Subjects.*" [Emphasis added.]

8. Chisolm, Executor v. Georgia, 1793, 2 U.S. 419.

upheld the claimed right in a decision whose essence the syllabus sums up in these words: "A State may be sued, in the Supreme Court, by an individual citizen of another State . . ."

The people, who had just adopted a Constitution which delegated certain powers to the central government, did not agree with this construction of what they had written; and they promptly adopted the Eleventh Amendment: "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [Emphasis supplied.]

The Amendment dealt solely with the prepositional phrases—"between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects"—being cast in the precise words of those phrases. And it dealt with the *construction* of those phrases only, stating without equivocation that the grant of power was not to be construed as authorizing a citizen or subject to sue another State. It directed simply that no court considering that phrase should have the power to construe it other than as directed by the Eleventh Amendment. The Amendment did not add anything to the Constitution and did not take anything from it. It simply gave directions as to the meaning of a phrase already in the Constitution. It was definitely a limitation on the right of any court to construe that language of the Constitution in such a way as to diminish the immunity from suit which is an essential and universal attribute of sovereignty.

It was not necessary that the Amendment negate the right of a citizen to sue his own State because Article III of the Constitution, which alone deals with the federal

Judiciary and defines the judicial power being delegated to the central government, nowhere mentions or hints at a case or controversy between a State and its own citizens as being justiciable by any court. As against its own citizens, therefore, a State did not need and has never needed the shelter or protection of the Eleventh Amendment.

It was almost a century after *Chisolm* v. *Georgia* and the Eleventh Amendment before the Supreme Court was faced with a suit brought by a citizen against his own State, *Hans* v. *Louisiana*, 1890, 134 U.S. 1. Jurisdiction in the Circuit Court was claimed under Article III of the Constitution, which declares that "The Judicial Power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made . . .," and the Act of March 3, 1875, 18 Stat. 470, c. 137, §1, now 28 U.S.C.A. §1331 (a), vesting in the Circuit Courts jurisdiction "of all suits of a civil nature at common law or in equity, arising under the Constitution or laws of the United States, or treaties made . . ." The lower court dismissed the suit and the Supreme Court affirmed without a dissent.

The opinion analyzes thoroughly the decision in *Chisolm* v. *Georgia*, the Eleventh Amendment, and the debates among the writers of the Constitution, and, in addition, those between Mason and Patrick Henry on one side and Madison and Marshall on the other, in the Virginia Convention. It quotes from Madison: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court;" and from Marshall: "With respect to disputes be-

tween a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . ." And it characterizes the contention that the passage of the Eleventh Amendment had the effect of leaving a State open to suit by its own citizens in cases arising under the Constitution or laws of the United States as ". . . supposition . . . almost an absurdity on its face." [Pp. 14 and 15.]

After quoting from a statement by Chief Justice Taney in *Beers et al* v. *Arkansas*, 20 Howard 527, 529: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued . . .;" the opinion states its conclusion thus:

> "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence . . ."

This decision in *Hans* v. *Louisiana* has been cited as authority by the Supreme Court in approximately thirty cases.[9]

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9. E.g., Ford Motor Co. v. Dept. of Treas. of Indiana, 323 U.S. 459, 464; Great Northern Ins. Co. v. Read, Ins. Comm., 1944,

This line of cases constitutes a continuing affirmation by the Court of the basic principle that the federal judicial system is one of enumerated powers, not of enumerated limitations upon power. The lack of power in the court below, therefore, to entertain a suit by the individual against the State is not dependent upon the negative language of the Eleventh Amendment, which merely points out that such power is not given, but on the basic fact that such power is not lodged in the federal judiciary under our constitutional system.

It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other State, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State.

The *Ford Motor Company* case, supra, stands for the well settled rule that waiver by a State of its sovereign immunity must be clearly shown, and that whether such a waiver has been established presents a question to be decided under State law (pp. 466-470). And cf. *Louisiana Land and Exploration Co.* v. *State Mineral Board,* 5 Cir., 1956, 229 F.2d 5, certiorari denied, 351 U.S. 975.

The Supreme Court of Alabama considered the provisions of the Alabama Constitution and statutes involved in the case before us in *State Docks Commission* v. *Barnes,* 1932, 143 So. 581. It was there decided that a claim for the death of one of the employees of the State Docks Commis-

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322 U.S. 47, 51; Monaco v. Mississippi, 1934, 292 U.S. 313, 322; Williams v. United States, 1933, 289 U.S. 553, 575; Ex parte State of New York, 1921, 256 U.S. 490, 497; Duhne v. New Jersey, 1920, 251 U.S. 311, 313; Palmer v. Ohio, 1918, 248 U.S. 32, 34; Ex parte Young, 1908, 209 U.S. 123, 150.

sion was a claim against the State, which was "performing a business or corporate power and not a governmental function." Continuing, the court said (page 582):

> "But Section 14 of the Bill of Rights of the Alabama Constitution provides that the State shall never be made a defendant in any court of law or equity. The State cannot consent to such a suit. This means not only that the State itself may not be sued, but that this cannot be indirectly accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to affect the financial status of the State treasury . . ."

"The right to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers* v. *Arkansas*, 20 Howard 527; *Railroad Company* v. *Tennessee*, 101 U.S. 337; *Hans* v. *Louisiana*, 134 U.S. 1." So says the Supreme Court in *Palmer et al* v. *State of Ohio*, 1918, 248 U.S. 32. And it is not contended that Alabama has given its express consent, but, on the contrary, its Supreme Court has held that it cannot so consent.

It is pertinent to mention that the State of Alabama has provided payment for injury to or death of any employee of the agency here involved "where in law, justice or good morals the same should be paid;" and that the remedy so provided is characterized by the Supreme Court as "a workmen's compensation law for State employees," *State Board of Adjustment* v. *Lacks*, 1945, 22 So.2d 377; and cf. *Hawkins* v. *State Board of Adjustment*, S. Ct. Ala., 1942, 7 So.2d 775.

It remains but to consider the three Supreme Court cases upon which appellant bases his chief reliance. The appellant frankly points out that none of the cases are

applicable on their facts, but contends that some of the language found in the opinions warrants the assumption that, by operation of law, Alabama necessarily waived its immunity from suit by electing to operate a common carrier engaged in interstate commerce. The language of each of the cases is, of course, limited to the facts with which the Court was dealing.

In *United States* v. *California*, 1936, 297 U.S. 175, it was claimed that § 6 of the Safety Appliance Act vested jurisdiction in the district court to entertain the suit by the United States for a statutory penalty imposed for violation of the Act. The application of the decision of the Supreme Court in that case, insofar as it has possible relation to the question before us, is thus pinpointed at page 187:

> "Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases 'in which a State shall be a party.' . . . But Congress may confer on inferior courts concurrent original jurisdiction of such suits. . . . Section 233 of the Judicial Code, 28 U.S.C., 341 . . . gives to this Court 'exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States or aliens.' "

The Court then goes on to decide that the later enacted § 6 of the Safety Appliance Act provides that the penalty which it imposes supersedes, for practical reasons, the provisions of the Judicial Code and, therefore, vests in the district court jurisdiction to recover the penalty against the State. The power to maintain the suit against the State is specifically vested by the Constitution in the United States. The case does not hint that an individual in whom the Constitution does not vest such a power could maintain such a suit against a State.

The action in *California* v. *Taylor, et al*, 1957, 353 U.S. 553, was brought by five employees of the State Belt Railroad operated by the Board of State Harbor Commissioners of California against the ten members of the National Railroad Adjustment Board, First Division, and its Executive Secretary. The United States, answering on behalf of the Board, supported the charges in the complaint that the Belt Road was governed by the Railway Labor Act of 1926 rather than by the Civil Service Laws of the State of California. The State of California intervened as a party defendant and opposed the claim of the employees of the Belt Railroad in which they sought to invoke the machinery of the Railway Labor Act. The Supreme Court held that the operation of the Belt Railroad was covered by the Railway Labor Act, and referred to the fact that several State courts, including an intermediate appellate court of California,[10] had held state owned belt railroads such as the ones here involved subject to the Federal Employers Liability Act. Following its decision in *United States* v. *California*, supra, the Supreme Court held that Congress had the right to regulate the California Belt Railroad's employment relationships. In Note 16, page 568, however, the Supreme Court stated:

> "The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Labor Relations Board in a suit against the State in a United States District Court under § 3, First (p) of the Act is not before us under the facts of this case."

This statement by the Supreme Court disposes of the contention of the appellants that this case is authority for the contention that Alabama had waived its immunity from suit.

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10. Maurice v. State, Dist. Ct. App., Cal., 1941, 110 P.2d 706.

Petty v. *Tennessee-Missouri Bridge Commission*, 1959, 359 U.S. 275, involved the question whether Tennessee and Missouri had waived their immunity to be sued when those States entered into a compact, with Congressional approval, for the construction of a bridge over the Mississippi River. To build and manage the bridge, there was created the Tennessee-Missouri Bridge Commission, a "body corporate and politic," wherein it was provided that the Commission had the power "to contract, to sue and be sued in its own name." The Court, after noting that "The conclusion that there has been a waiver of immunity will not be lightly inferred, *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171," decided that, under the facts of that case and "where the waiver is, as here, claimed to arise from a compact between several States," the Commission was suable under the sue-and-be-sued clause interpreted in the light of the conditions attached by Congress in approving the bridge over the navigable stream.[11] We think that the case is not authority for the waiver claimed here, and refer to the language used by this Court in *McDermott & Co.* v. *Department of Highways, State of Louisiana*.[12]

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11. In a footnote, Mr. Justice Frankfurter, dissenting (page 289), stated the following:

> "Suit in United States v. California, 297 U.S. 175, was instituted by the United States, and jurisdiction over such an action is not within the proscription of the Eleventh Amendment. In California v. Taylor, 353 U.S. 553, the State intervened in an action brought against the National Railroad Adjustment Board, hence voluntarily submitted itself to the jurisdiction of the federal courts."

12. 5 Cir., 1959, 267 F.2d 317, 318:

> "Appellee, in its turn, citing, as settling the law to the contrary of this contention, other cases and Petty v. Tenn.-Mo. Bridge Comm., 8 Cir., 254 F.2d 857, reversed (three judges dissenting) in Petty v. Tenn.-Mo. Bridge Comm., 358 U.S. 811 . . . not in principle but on the sole ground that the Act of Congress approving the interstate compact had made provision for the suit there brought, urges upon us that the judgment must be affirmed.

Based upon the authorities cited and the foregoing reasons, we hold that the State of Alabama is constitutionally immune from suit under the facts before us and that there has been no waiver of this immunity. The judgments entered in the captioned case and the others consolidated with it by order of the court below are

AFFIRMED.

BROWN, Circuit Judge, concurring specially:

I concur in the result and in much of the Court's opinion.

But in at least two places the Court states that "the State of Alabama is *constitutionally* immune from suit." ____ F.2d ____[1] Apart from the Eleventh Amendment, I find nothing in the Constitution nor in the elaborate structure of the opinion in *Hans* v. *Louisiana*, 1890, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842, to support that conclusion as a matter of federal constitutional law. Sovereign immunity threadbare as it generally is, is recognized in law. It may, as it does here, deny effectual enforcement to a clear legal right. But that does not raise this motion to the stature of a federal constitutional right.

"This Court in a case involving a collision with a bridge in Broward County, Florida [Broward County, Florida, v. Wickman, 5 Cir., 195 F.2d 614], has settled it for this Circuit, as the Supreme Court in Ex parte, State of New York, 356 U.S. 490, . . . has for the country as a whole, that 'the immunity of a State from a suit in personam in the admiralty brought by a private person without its consent is clear.'"

1. See also: "It is clear, therefore, that a State has the same *constitutional* immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State." ____ F.2d ____

Moreover, I think the constitutional crisis generated by *Chisholm* v. *Georgia*, 1792, 2 U.S. 2 Dall 419, 1 L. Ed. 440, refutes this Court's thesis that when it was all said and done the Eleventh Amendment "* * * did not add anything to the Constitution and did not take anything from it." ____ F.2d ____. And to the extent that *Hans* v. *Louisiana* really puts the result on the basis of the traditional immunity of a State, rather than on the obvious implications of the Eleventh Amendment, it seems clear to me that the Supreme Court did not undertake to cast it,[2] as does this Court, in terms of a Constitution of enumerated powers and the "basic fact that such power is not lodged in the federal judiciary under our constitutional system." ____ F.2d ____. This latter would, among other things, mean that *jurisdiction* would be conferred by consent (of the sovereign waiving its immunity). This certainly contradicts a basic concept of a limited federal jurisdiction.

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2. The strongest statement in *Hans* in this direction is: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15.

The Court speaks again in terms of suits unknown to or forbidden by law in Fitts v. McGhee, 1899, 172 U.S. 516, 524, 19 S. Ct. 269, 43 L. Ed. 535:

> "Is this a suit against the State of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state. But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a state by citizens of another state of the Union, or by citizens or subjects of foreign states. Hans v. Louisiana, 134 U.S. 1, 10, 15 [33:842, 845, 847]; North Carolina v. Temple, 134 U.S. 22 [33:849]. It is therefore an immaterial circumstance in the present case that the plaintiffs do not appear to be citizens of another state than Alabama, and may be citizens of that state."

What the case presents is the anomaly of a clear legal right without any means of effectual enforcement. Without a doubt, Alabama and its operating agencies, the Terminal Railway and Docks Department are subject to the FELA. It is even likely that its scheme of vicarious workmen's compensation constitutes an outright violation of the Act which prohibits any contract, rule, regulation or device to enable a common carrier to exempt itself from the liabilities imposed.[3]

But clear as is the legal right, invalid as is the substitute compensation program, neither in the FELA nor in the Alabama statutes prescribing the physical operation of this interstate carrier is there enough material out of which to extract even the faintest notion of a waiver of that traditional immunity which Alabama painstakingly has additionally preserved by its own express constitutional provision.

The suit therefore must fall. But we should not by our discussion couched in language of a *constitutional* immunity apart from the Eleventh Amendment foreclose remedial action by Congress or, perhaps, judicial relief in its own courts at the hands of agencies of the United States Government whose statutory policy may not be thwarted by this plea.

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3. "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *." 45 U.S.C.A., § 55.

APPENDIX B.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,519

D. C. Docket Nos. 2551, 2552, 2553, 2588, 2697 Civil.

R. B. PARDEN, ET AL.,
Appellants,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Alabama.

Before RIVES, CAMERON and BROWN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments entered in the captioned case and the others consolidated with it by order of the court below be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, R. B. Parden, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Concurs Specially"

January 3, 1963

Issued as Mandate: March 20, 1963

APPENDIX C.

Order of Court Denying Petition for Rehearing

[102]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19,519

R. B. PARDEN, ET AL.,
Appellants,

versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Alabama.

(February 27, 1963)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and BROWN, Circuit Judges.
PER CURIAM.

IT IS ORDERED that appellants' petition for rehearing be, and it is hereby DENIED.

APPENDIX D.

45 U.S.C.A., § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia, and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children or such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX E.

45 U.S.C.A., § 56

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

APPENDIX F.

45 U.S.C.A., § 1

§ 1. Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed

without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, § 1, 27 Stat. 531.

APPENDIX G.

45 U.S.C.A., § 2

§ 2. Automatic couplers

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

APPENDIX H.

ALABAMA CONSTITUTION OF 1901, AMENDMENT 12

XII.

Mobile Port Amendment.

Section 93. The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such, except as may be authorized by the Constitution of Alabama or amendments thereto; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation, except as may be expressly authorized by the Constitution of Alabama, or amendments thereto; but when authorized by laws passed by the legislature the state may appropriate funds to be applied to the construction, repair, and maintenance of public roads, highways and bridges in

the state; and when authorized by appropriate laws passed by the legislature the state may at a cost of not exceeding ten million dollars engage in the work of internal improvement, or promoting, developing, constructing, maintaining, and operating all harbors and seaports within the state or its jurisdiction, provided, that such work or improvement shall always be and remain under the management and control of the state, through its state harbor commission, or other governing agency. The adoption of this amendment shall not affect in any manner any other amendment to the Constitution of Alabama which may be adopted pursuant to any act or resolution of this session of the legislature.

APPENDIX I.

ALABAMA CONSTITUTION OF 1901,

AMENDMENT 116

CXVI.

STATE WORKS OF INTERNAL IMPROVEMENT ALONG NAVIGABLE WATERWAYS AND INDEBTEDNESS THEREFOR.

In addition to the authority heretofore granted it by section 93 of this Constitution as amended, and notwithstanding the provisions of section 213 of this Constitution as amended, and when authorized by appropriate laws passed by the legislature, the state may, at a cost of not exceeding an additional ten million dollars engage in works of internal improvement by promoting, developing, constructing, maintaining and operating along navigable streams or waterways now or hereafter existing within the state all manner of docks, facilities, elevators, warehouses, water and rail terminals and other structures and facilities and improvements needful for the convenient use of the same, in aid of commerce and use of the water-

ways of the state; provided that any such work or improvements shall always be and remain under the management and control of the state through the Alabama state docks department or other state governing agency. When authorized by appropriate laws passed by the legislature, the state may become indebted in an aggregate principal amount of not exceeding $10,000,000 for the purpose of carrying out the provisions of this amendment and may cause to be issued its general direct obligation bonds for the repayment of such indebtedness and interest thereon and pledge the faith and credit of the state thereto.

APPENDIX J.

1940 CODE OF ALABAMA (RECOMPILED 1958)

TITLE 38, § 17

§ 17. State may acquire, etc., terminal railroads.—The state through the department shall have the power and authority to acquire, own, lease, locate, install, construct, hold, maintain, control and operate at seaports a line of terminal railroads with necessary sidings, turn outs, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith or appurtenant thereto snall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliance necessary or proper to carry passengers, goods, wares, and merchandise over, along or upon the tracks of such railroads or other conveyances. And the state, acting through the said department, shall have the right and authority to make agreements as to scale of wages, seniority and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the opera-

tion of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said department exercise the authority herein given then in such event it shall be the duty of the said department to make such agreements with said employees hereinabove specified, in accordance with the act of congress known as the Railway Labor Act (U.S.C. Title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby. The state, acting through the said department, shall have the right and authority with its terminal railroads to connect with or cross any other railroad upon the payment of just compensation and to receive, deliver to and transport the freight, passengers, and cars of common carrier railroads as though it were an ordinary common carrier. (1923, p. 330; 1927, p. 1; 1935, p. 821; 1936, Ex. Sess. p. 57.)

APPENDIX K.

1940 CODE OF ALABAMA (RECOMPILED 1958)

TITLE 38, § 45 (14, 16)

§ 45(14): Authority of state and state docks department.—In addition to the authority granted to the state of Alabama by the provisions of section 93 of the Constitution of Alabama as amended, and any other laws of this state, the state is hereby expressly authorized and empowered to engage in works of internal improvement by promoting, developing, constructing, maintaining and operating along navigable rivers, streams or waterways

now or hereafter existing within this state, all manner of dock facilities, elevators, compresses, warehouses, water and rail terminals, and other structures and facilities and improvements of every kind needful for the convenient use of same, in aid of commerce and use of the waterways of this state, provided, however, that all such works, improvements and facilities shall always be and remain under the management and control of the Alabama state docks department. The Alabama state docks department shall be the agency of the state under which the state shall accomplish all the purposes of this chapter and the acquisition, construction, maintenance and operation of all the improvements and facilities acquired or constructed or enlarged pursuant to the provisions of this chapter. (1957, p. 409, § 1.)

§ 45(16). Authority to acquire, construct, maintain, etc., facilities.—Through the Alabama state docks department, the state, in engaging in the works of internal improvements authorized by this chapter, shall have the power to acquire, purchase, install, lease, construct, own, hold, maintain, equip, control and operate along navigable rivers, streams or waterways and at river ports or landings along navigable rivers, streams or waterways now or hereafter existing within the state, wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses, improvements and water and rail terminals and such structures and facilities as may be needful for convenient use of the same, in aid of commerce and use of navigable waterways of the state, to the fullest extent practical and as the state docks department shall deem desirable or proper. This authority shall include dredging of approaches to any facilities acquired, erected, maintained or operated pursuant to this chapter; provided, however, that before the state docks department shall exercise the authority invested in it hereby, the director of state docks

shall first submit plans, including estimates of cost, prepared by competent engineers or architects, and a survey made by competent independent and professional engineers showing the economic feasibility of exercising its authority, to the governor for his approval or disapproval in reference thereto, and, as to dredging, the state docks director shall likewise confer with proper United States authorities; provided, the state docks department shall have no authority to condemn or acquire by exercise of the right of eminent domain any privately owned ports, terminal, docks or loading facilities located on any navigable river or stream except at the port of Mobile. (1957, p. 409, § 3.)

APPENDIX L.

UNITED STATES CONSTITUTION, ART. I, § 8, cl. 3

(Commerce Power)

"The Congress shall have the Power * * * To regulate Commerce with foreign Nations and among the several States * * *."